

FREEDOM OF INFORMATION ACT REQUEST

September 28, 2021

National FOIA Office
U.S. Environmental Protection
Agency 1200 Pennsylvania
Avenue NW (2310A)
Washington, DC 20460

Re: FOIA Request - Certain Agency Records (Correspondence)

Dear Sir or Madam:

On behalf of Energy Policy Advocates, a non-profit organization incorporated under the laws of Washington State, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, I hereby request copies of the following records: all electronic correspondence, whether email, text, SMS, etc., and any accompanying information, including also any attachments, a) sent to or from or which copies (whether as cc: or bcc:) i) Campbell.Ann@epa.gov and/or ii) rakosnik.delaney@epa.gov, that b) was also sent to or from or which copies (again, whether as cc: or bcc:) or mentions, *anywhere*, National Climate Advisor Gina McCarthy (including “Gina” and/or “McCarthy”), that also c) includes, *anywhere*, the following terms: i) “CO2”, ii) “NAAQS”, iii) “GHG” (including in “GHGs”), and/or iv) “Paris”, and d) is dated January 21, 2021 through the date you process this request, inclusive.

We request entire “threads” of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter.

Please consider as non-responsive electronic correspondence that merely receives or forwards newsletters or press summaries or ‘clippings’, such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread

(an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only “fyi”, or “interesting”).

Additionally, please consider all published or docketed materials, including pleadings, regulatory comments, ECF notices, news articles, and/or newsletters, as non-responsive, unless forwarded to or from the named persons with substantive commentary added by the sender.

For this request, the term “all records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as hard copy or electronic correspondence with entities or individuals outside the federal government), emails, text, SMS, Telegram, Signal, WhatsApp or other instant messages, letters, notes, telephone records, telephone notes, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, telephone logs, digital logs such as those produced by Microsoft Teams (including Teams file folders or collaborative work documents housed in Teams), papers published, and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records.

This request is not meant to exclude any other record(s) or part(s) thereof that, although not specifically requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from

denying requests for information under the FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, recipients, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you should seek to withhold or redact any responsive records or parts thereof, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

EPA is willing to receive records on a rolling basis, but only within the requirements of FOIA.

Format of Requested Records

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, *e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”).

“Readily accessible” means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B).

Energy Policy Advocates requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee’s own machine or account. We do not demand your office produce requested information in any particular form, instead **we request records in their native form**, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards. The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

We seek responsive records in their native form, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.¹ The covered information we seek is electronic information, this includes electronic *records*, and other public *information*. To quote the SEC Data Delivery Standards, “Electronic files must be produced in their native format, *i.e.*, the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. (*Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.*)” (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data and must be produced as they

¹ <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf>.

are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

We appreciate the inclusion of an index.

Fee Waiver Request

Our request for fee waiver is in the alternative, first for reasons of significant public interest, and second, on the basis of the Energy Policy Advocates' status as a media outlet.

The Department must address both of these requests for fee waiver in the event it denies one; failure to do so is *prima facie* arbitrary and capricious.

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C.

Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as EPA access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. EPA Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). See also, 22 C.F.R. § 171.16.

First, as explained herein, the federal government acknowledges EPA's status as a media requester. Further, in the alternative thus, the Department must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure "is likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "is likely to contribute to public understanding" of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 22 C.F.R. § 171.16. As shown below, EPA and this request meet each of these factors.

A. The Subject of This Request Concerns “the Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of senior officials. This request asks for: All records pertaining or relating to ethics waivers and/or recusals of Ms. McCarthy. This request includes, but is not limited to, any final memoranda developed for the purpose of outlining recusal obligations, potential conflicts of interest that might involve former employers, their clients or members, and any particular matters that have been identified, as well as any waivers issued by Administration officials. This request also includes any and all communications, including written analysis in any form, by and to officials regarding meeting requests with non-governmental entities involving Ms. McCarthy. If any requested records were produced prior to the official start date of Ms. McCarthy, those should also be included.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

As described, above, the requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

The requested records, if they exist, pertain to the sweeping environmental regulatory agenda of the Biden Administration, which is of major media, public and policy interest. Public records indicate that Acting Air Chief Joe Goffman uses Ms. Campbell and Ms. Rakosnik to correspond with his contacts from their own email accounts, avoiding the use of his EPA email account, which account public records also show is the subject of great public interest. Taking this step makes records responsive to this request inherently therefore also of public interest but more so. Any records responsive to this request therefore are likely to have an informative value and are “likely to contribute to an understanding of Federal government operations or activities”.

We note President Biden's environmental agenda has been the subject of substantial media interest and promotional efforts.²

Disclosure of the requested records will allow EPA to convey to the public information about whether officials such as Ms. McCarthy, who is charged with assisting in and executing policy and the duties of office, are acting consistently with all of the laws, rules, and regulations that govern the actions and activities of a high-ranking and non-career government official. After disclosing records relating to the ethics obligations of Ms. McCarthy, EPA will inform the public about the ethics obligations and actions of Ms. McCarthy in order to ensure decisions that are being made consistent with the law. Once the information is made available, EPA will analyze it and present it to its followers and the general public in a manner that will meaningfully enhance the public's understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of government operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of the Ethics Obligations of a Non-Career Appointees.

For reasons already described, the requested records will contribute to public understanding of the ethics advice provided by career officials, to help ensure future actions, decisions, and deliberations of non-career appointees are conducted in a compliant manner. As explained above, the records will contribute to public understanding of this topic.

Ethics obligations exist to reduce the likelihood that senior government officials are making decisions in a biased or arbitrary manner or to benefit the interests of former

² <https://www.washingtonpost.com/climate-environment/2021/01/26/biden-environmental-justice-climate/> and <https://www.epa.gov/newsreleases/epa-welcomes-members-biden-harris-leadership-team> (last assessed April 8, 2021).

employers, clients or related parties. Ensuring the avoidance of conflicts of interest or the appearance of bias is of interest to a reasonably broad segment of the public. EPA will use the information it obtains from the disclosed records to educate the public at large about what obligations have been identified for Ms. McCarthy. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Through EPA’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa.2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern the integrity of actions taken by Ms. McCarthy since the new Administration took over. We are also unaware of any previous release to the public of these or similar records. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records “clarify important facts” about agency policy, “the CLS request

would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations”.

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of what obligations senior officials such as Ms. McCarthy have and whether they are able to compliantly participate in the many activities in which their official position may otherwise be expected to participate in. The public is always well served when it knows how the government conducts its activities, particularly matters touching on ethics questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about the potential conflicts of interest and recusal obligations of non-career appointees.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

EPA is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of the potential conflicts of interest and likelihood of an appearance of bias in decision-making as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be significantly increased as a result of disclosure.

The records are also certain to shed light on the Administration’s compliance with its own ethics proclamations in that they pertain to officials covered by ethics disclosure and recusal obligations. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, EPA meets this factor as well.

II. EPA has the Ability to Disseminate the Requested Information Broadly.

EPA is dedicated to obtaining and disseminating information relating to energy and environmental public policy. A key component of being able to fulfill this mission and educate the public about these duties is access to information that articulates what obligations exist for senior government officials. EPA has both the intent and the ability to convey any information obtained through this request to the public. Energy Policy Advocates publishes its findings regularly through the organization's website, www.epadvocates.org. This work is frequently cited in newspapers and trade and political publications.³ EPA intends to publish information from requested records on its website, distribute the records and expert analysis to its followers through social media channels including Twitter, Facebook, and other similar platforms.

Through these means, EPA will ensure: (1) that the information requested contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that EPA possesses the expertise to explain the requested information to the public; (4) that EPA possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes EPA as a reliable source in the field of government officials' conduct.

Public oversight and enhanced understanding of the Administration's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the

³ See, e.g., recent coverage at Editorial, *Wall Street Journal*, "Biden's 'BackDoor' Climate Plan," March 17, 2021, <https://www.wsj.com/articles/bidens-backdoor-climate-plan-11616020338>, and Stuart Parker, "Conservative Group Says States' Ozone Suit 'Trojan Horse' for GHG Limits," *Inside EPA*, February 24, 2021.

subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). EPA need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.” *Judicial Watch*, 326 F.3d at 1314. It is sufficient for EPA to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Requester.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to EPA’s role of educating the general public. EPA is a 501(c)(3) nonprofit public policy institute dedicated to transparency in public energy and environmental policy. Due to its nonprofit mission, EPA has no commercial interest and will realize no commercial benefit from the release of the requested records.

Therefore, **Energy Policy Advocates first seeks waiver of any fees** under FOIA on the above significant public interest basis.

In the alternative, Energy Policy Advocates requests a waiver or reduction of fees as a representative of the news media. The provisions for determining whether a requesting party is a representative of the news media, and the “significant public interest” provision, are not mutually exclusive. As Energy Policy Advocates is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F.Supp.2d. 1 (D.D.C. 2010). Alternately and only in the event the Agency refuses to waive our fees under the “significant public interest” test, which Requester would then appeal while requesting the Agency proceed with processing on the grounds that Energy Policy Advocates is a media organization, a designation the federal government has acknowledged for the purposes of FOIA, the Agency must explain any denial

of treatment of EPA as a media outlet.⁴ Requester asks for a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by. . . a representative of the news media...”).

The Agency must address both of these requests for fee waiver in the event it denies one; failure to do so is *prima facie* arbitrary and capricious.

Energy Policy Advocates looks forward to your response. If you have any questions, please contact me at the below email address. All records and any related correspondence should be sent to my attention at the address below. If you have any questions, please contact me at the below email address.

Sincerely,
Rob Schilling, Executive Director
Energy Policy Advocates
Schilling@allhookedup.com

⁴ See, e.g., Securities & Exchange Commission Requests No. 21-00769-FOIA, No. 21-01234-FOIA; Department of the Interior Request No. DOI-OS-2021-003335.